

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GUY ROLAND SEATON,  
Petitioner,

No. C - 08-0105 MHP  
CR- 02-00044 MHP

v.

**MEMORANDUM & ORDER**

UNITED STATES OF AMERICA,  
Respondent.

**Re: Petitioner's Motion to Vacate Plea,  
Judgment and Sentence Pursuant to 28  
U.S.C. section 2255**

On December 19, 2002, Guy Roland Seaton ("Seaton") was convicted by a jury in this court of six counts relating to Medicare fraud. Based on his conviction, the court sentenced Seaton to a 78-month prison sentence. Now before the court is Seaton's motion to vacate his judgment and sentence pursuant to 18 U.S.C. section 2255. In substance, Seaton contends that he was denied effective assistance of counsel, during both his trial and on appeal, in violation of his Sixth Amendment and due process rights. Having considered the parties' arguments and submissions and for the reasons stated below, the court enters the following memorandum and order.

**BACKGROUND**

On May 8, 2001, Seaton, the Chief Operating Officer, President, owner and operator of St. Luke's Subacute Hospital and Nursing Centre, Inc. ("St. Luke's"), was indicted on six counts relating to Medicare fraud. Docket No. 1 (Indictment). Counts Two through Four of the indictment alleged that Seaton violated U.S.C. section 287 by submitting cost reports to the Medicare program

1 that Seaton knew to be false, fictitious and fraudulent. Count Five alleged that Seaton violated 18  
2 U.S.C. section 1001 by knowingly submitting material false, fictitious and fraudulent statements and  
3 representations regarding how much time certain nurses at St. Luke's spent tending to Medicare  
4 patients. Count Five alleged that Seaton violated 18 U.S.C. section 1516 by endeavoring to obstruct  
5 and impede a federal audit into the fraudulent submissions to the Medicare program. Finally, Count  
6 One alleged that Seaton violated 18 U.S.C. section 371 by conspiring to violate the above sections of  
7 the criminal code. As is mentioned above, on December 19, 2002, a jury found Seaton guilty of all  
8 six counts, and on April 15, 2004, the court sentenced Seaton to a 78-month prison term. Seaton  
9 appealed his conviction, and on May 5, 2006, the Ninth Circuit affirmed the court's decision.  
10 *United States v. St. Luke's Subacute Care Hosp., Inc.*, 178 Fed. Appx. 711 (9th Cir. 2006). On  
11 January 8, 2007, the United States Supreme Court denied his petition for writ of certiorari. *St.*  
12 *Luke's Subacute Hosp. & Nursing Ctr., Inc. v. United States*, 549 U.S. 1116 (2007).

13 In January 2008, Seaton filed a motion pursuant to 28 U.S.C. section 2255 to vacate or set  
14 aside his convictions, alleging nine separate entitlements to relief. Docket No. 294. Seaton did not  
15 file the memorandum in support of his petition until May 30, 2008. Docket No. 304. On March 23,  
16 2009, the court issued an order to show cause, requiring that the government respond to three of  
17 Seaton's nine arguments. Docket No. 307. With the benefit of full briefing on Seaton's petition, the  
18 court now holds that the petition can be resolved without a hearing.

## 19 20 LEGAL STANDARD

21 A prisoner in federal custody may move to vacate, set aside or correct his or her sentence  
22 pursuant to 28 U.S.C. section 2255. 28 U.S.C. § 2255. This federal habeas statute allows a prisoner  
23 in federal custody to challenge the imposition or the length of the sentence "upon the ground that the  
24 sentence was imposed in violation of the Constitution or laws of the United States, or that the court  
25 was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum  
26 authorized by law, or is otherwise subject to collateral attack." *Id.* If any of these four grounds  
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1 exist, the court “shall vacate and set the judgment aside and shall discharge the prisoner or re-  
2 sentence him or grant a new trial or correct the sentence as may appear appropriate.” *Id.*

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4 DISCUSSION

5 In the order to show cause issued by this court, the court required the government to respond  
6 to only three of the nine grounds for relief that Seaton asserted in his petition for relief. The three  
7 remaining claims all assert that Seaton’s trial and/or appellate counsel provided Seaton with  
8 ineffective assistance of counsel. Claims of ineffective assistance of counsel, both trial and  
9 appellate, are examined under the well-worn, two-prong standard established in *Strickland v.*  
10 *Washington*, 466 U.S. 668 (1984). To prevail, a petitioner must first establish that his counsel’s  
11 performance was deficient, i.e., that it fell below an “objective standard of reasonableness” under  
12 prevailing professional norms. *Id.* at 687-68. Judicial review of counsel’s performance is highly  
13 deferential and there is a strong presumption that counsel’s conduct fell within the wide range of  
14 reasonable professional assistance. *Id.* at 689. The relevant inquiry is not what counsel could have  
15 done, but whether the choices counsel made were reasonable. *Babbitt v. Calderon*, 151 F.3d 1170,  
16 1173 (9th Cir. 1998). Second, a petitioner must establish that he was prejudiced by counsel’s  
17 deficient performance, i.e., that “there is a reasonable probability that, but for counsel’s  
18 unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S.  
19 at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome.  
20 *Id.* Where the petitioner is challenging his conviction, the appropriate question is “whether there is a  
21 reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt  
22 respecting guilt.” *Id.* at 695.

23 The presumption of reasonable performance is even stronger for appellate counsel because  
24 they have wider discretion than trial counsel in weeding out weaker issues; doing so is widely  
25 recognized as one of the hallmarks of effective appellate assistance. *Miller v. Keeney*, 882 F.2d  
26 1428, 1434 (9th Cir. 1989). Throwing in every arguable issue would do disservice to the client  
27 because it would detract an appellate judge’s attention from stronger issues and reduce appellate  
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1 counsel's credibility before the appellate court. *Id.* Therefore, appellate counsel has no  
2 constitutional duty to raise every nonfrivolous issue requested by his client. *Id.* at 1434 n.10. To  
3 establish ineffective assistance of appellate counsel, a petitioner must show that had his appellate  
4 counsel raised an issue on appeal, it would have led to reversal. *See id.* at 1434.

5 A court need not approach the two-prong analysis in any particular order. *Strickland*, 466  
6 U.S. at 697. Indeed, "if it is easier to dispose of an ineffectiveness claim on the ground of lack of  
7 sufficient prejudice . . . that course should be followed." *Id.*

8 I. Procedural Bar

9 The court must first contend with the government's argument that Seaton is procedurally  
10 barred from raising his ineffective assistance of counsel claims. The government suggests that  
11 Seaton waived his ineffective assistance claims by failing to raise them on appeal. The  
12 government's argument betrays a shocking ignorance of habeas law related to ineffective assistance  
13 of counsel. It is an unchallenged and longstanding maxim that ineffective assistance of counsel  
14 claims may be raised in a section 2255 claim whether or not the petitioner could have raised such a  
15 claim on appeal. *See Massaro v. United States*, 538 U.S. 500, 504 (2003) ("[F]ailure to raise an  
16 ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in  
17 a later, appropriate proceeding under § 2255."). Accordingly, the court proceeds to the merits of  
18 Seaton's claims.

19 II. Ineffective Assistance of Appellate Counsel for Failing to Reraise an Objection to Testimony  
20 of Agent Steven Lack

21 Seaton first argues that his appellate counsel rendered ineffective assistance of counsel by  
22 failing to appeal the court's overruling of an evidentiary objection made by Seaton's trial counsel to  
23 purported expert opinion testimony offered by Steven Lack. Agent Lack was a Special Agent with  
24 the Department of Health and Human Services, Office of Inspector General, and the case agent and  
25 supervisor of the investigation into Seaton's activities. Tr. Trans., vol. 2, at 305-06. Although his  
26 background and experience may have been sufficient to qualify him as an expert on the  
27 administration of the Medicare program, he was not offered as an expert by the prosecution.  
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1 In order to understand the substance of Agent Lack's testimony and the thrust of Seaton's  
2 argument, some background is necessary regarding the Medicare regulations governing the reporting  
3 of nursing costs, the nature of the charges against Seaton and the defense that Seaton presented to  
4 those charges.<sup>1</sup> The evidence at trial indicated that St. Luke's was only partially certified as a  
5 Medicare Skilled Nursing Facility (SNF), meaning that it was only entitled to reimbursement from  
6 the Medicare program for nursing services expended on the parts of the facility that were certified as  
7 a SNF. Under the regulations and rules governing the administration of the Medicare program, a  
8 partial SNF "must have the record keeping capability to insure that it can adequately furnish the  
9 financial and statistical data required to separately determine costs applicable to the portion of the  
10 facility participating as an SNF and to other parts of the facility." Medicare Provider  
11 Reimbursement Manual § 2340,  
12 [http://www.cms.gov/Manuals/PBM/itemdetail.asp?filterType=none&filterByDID=-](http://www.cms.gov/Manuals/PBM/itemdetail.asp?filterType=none&filterByDID=-99&sortByDID=1&sortOrder=ascending&itemID=CMS021929&intNumPerPage=10)  
13 [99&sortByDID=1&sortOrder=ascending&itemID=CMS021929&intNumPerPage=10](http://www.cms.gov/Manuals/PBM/itemdetail.asp?filterType=none&filterByDID=-99&sortByDID=1&sortOrder=ascending&itemID=CMS021929&intNumPerPage=10).<sup>2</sup> Pursuant to  
14 this rule, Seaton and St. Luke's were required to keep records distinguishing between the nursing  
15 services delivered to SNF beds (known as Medicare distinct parts) and non-SNF beds (known as  
16 non-distinct parts), and then submit those records to Medicare, or in this case, to a fiscal  
17 intermediary, Mutual of Omaha. The Medicare Provider Reimbursement Manual explains that the  
18 accounting of costs submitted to Medicare or the intermediary "should be an equitable allocation of  
19 the nursing service costs between the distinct and other parts of the facility based on records or  
20 notations made at the time the services were rendered." *Id.*

21 The government's theory of the case was that Seaton fraudulently manipulated the time cards  
22 of the nurses working at St. Luke's and the cost reports submitted to Mutual of Omaha so that the  
23 nurses for whom he could charge the highest rates, registered nurses, worked all of their time on  
24 Medicare distinct part of St. Luke's. In this manner, the government argued that Seaton knowingly  
25 submitted material false, fictitious and fraudulent statements of nursing service costs to the Medicare  
26 program because the statements inequitably allocated nurses' time between the distinct and non-  
27 distinct parts of the facility. Seaton's primary, if not sole, defense was that "the Medicare  
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1 regulations permitted reasonable allocation of costs which need not reflect the actual hours” worked  
2 by specific nurses on the distinct and non-distinct parts of the facility. *See* Seaton’s Reply at 10.  
3 Seaton contended that although his records may not have perfectly tracked which nurses worked in  
4 which part at which times, the cost reports submitted to Mutual of Omaha were an equitable  
5 allocation of the overall costs incurred at St. Luke’s. The court instructed the jury that it could only  
6 find Seaton guilty of Counts Two through Five of the indictment if “there [was] no reasonable  
7 interpretation of the [Medicare] requirements . . . to which the [cost reports] responded that would  
8 make the statements [in the cost reports] true.” Tr. Trans., vol. 15, at 2260.

9 Having provided some background, the court now turns to the specifics of Seaton’s  
10 ineffective assistance claim. At trial, Agent Lack generally testified that in the course of his  
11 investigation, he discovered that Seaton, “through the cost reports filed by St. Luke’s Subacute, had  
12 inflated the nursing costs to the Medicare program, and that false documents were submitted to  
13 Medicare auditors and to Medicare to support the false cost report, and by giving the false  
14 documents, schedules, to Medicare auditors, thereby they obstructed Medicare’s ability to audit  
15 those cost reports.” Tr. Trans., vol. 2, at 311-12. On cross-examination, Seaton’s trial counsel  
16 attempted to establish, among other things, that Seaton “equitably allocated” the costs pursuant to  
17 the appropriate regulations. Trial Tr. vol. 3, 400-41. The government, on redirect, questioned Agent  
18 Lack as to whether, based on his investigation, he believed that Seaton equitably allocated the costs  
19 between the Medicare distinct part and the non-Medicare part of St. Luke’s. *Id.* at 475. Agent Lack  
20 responded that Seaton “did not equitably allocate [the nurses’] time.” *Id.* Seaton’s trial counsel  
21 repeatedly objected to the question and Agent Lack’s answer on the grounds that it constituted  
22 inadmissible expert opinion testimony. *Id.* at 475, 477. The court overruled these objections. *Id.* at  
23 475, 477.<sup>3</sup>

24 Seaton contends that Agent Lack’s testimony was improperly admitted expert opinion  
25 testimony pursuant to Federal Rule of Evidence 701 because, without being qualified as an expert  
26 witness under Rule 702, Agent Lack was permitted to offer an opinion “based on scientific,  
27 technical, or other specialized knowledge”—that Seaton’s conduct violated the Medicare  
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1 reimbursement rules. Seaton further argues that Agent Lack's testimony undermined Seaton's sole  
2 defense, and that Agent Lack's testimony was the only evidence adduced by the government  
3 regarding the inequitable allocation of costs. Seaton claims that by failing to raise this issue on  
4 appeal, his appellate attorney's performance fell below an objective standard of reasonableness  
5 under prevailing professional norms, and that had his attorney raised issue on appeal, the Ninth  
6 Circuit would have reversed Seaton's convictions on all six counts.

7 Assuming, *arguendo*, that Agent Lack was improperly permitted to propound an expert  
8 opinion regarding Seaton's allocation of Medicare costs, Seaton would still be unable to demonstrate  
9 that the admission of such testimony caused him prejudice. An erroneous, nonconstitutional  
10 evidentiary ruling only requires reversal of a conviction if it is more probable than not that the error  
11 materially affected the verdict. *See United States v. Freeman*, 498 F.3d 893, 901 (9th Cir. 2007).  
12 An error is harmless, i.e., it is not more probable than not that the error materially affected the  
13 verdict, where ample other evidence in the record supports a defendant's conviction. *See id.* at 905-  
14 06 (holding that improperly admitted expert testimony was harmless). A habeas petition must be  
15 denied if the government adequately demonstrates that the improperly admitted evidence was  
16 harmless, as the petitioner would be unable to satisfy *Strickland*'s prejudice prong. *See Carrafa v.*  
17 *Middleton*, No. 99-3905, 2001 WL 58975, at \*9 (N.D. Cal. Jan. 18, 2001) (Walker, J.) (holding that  
18 even if evidence establishing the petitioner's guilt improperly admitted, the petitioner's ineffective  
19 assistance of counsel claim failed because she could not establish the prejudice prong of the  
20 *Strickland* test as there was ample other evidence in the record that proved guilt).<sup>4</sup>

21 In the instant case, there was overwhelming evidence, both direct and circumstantial, that  
22 Seaton inequitably allocated Medicare costs. Belinda Swiatlowski, Seaton's executive assistant,  
23 testified that Seaton ordered her to manipulate the payroll records such that all of the hours for the  
24 registered nurses who worked at St. Luke's were recorded as having been spent tending to Medicare  
25 patients because the registered nurses were paid the highest rates. Trial Tr., vol. 3, at 510-20. Joan  
26 Lipanovich, a senior accountant at St. Luke's, testified that Seaton ordered her, without any  
27 justification, to manipulate the company books to shift non-Medicare costs to Medicare. Trial Tr.,  
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1 vol. 4, at 685-87. Carmelita Dimaano, Seaton's director of nursing, testified that Seaton ordered her  
2 to make up false schedules and submit them to federal auditors in order to obfuscate earlier,  
3 fraudulent cost reports that had been submitted to Mutual of Omaha. Trial Tr., vol. 7, at 1164-65.  
4 The government also introduced documentary evidence of two separate sets of accounting ledgers,  
5 one in which Seaton documented the actual hours spent by nurses on Medicare patients and one in  
6 which Seaton fraudulently manipulated the hours so that the registered nurses spent all of their time  
7 working on Medicare patients. Furthermore, Agent Lack testified regarding the evidence unearthed  
8 by his investigation and the manner in which Seaton went about defrauding the Medicare program.  
9 Thus, contrary to Seaton's assertion, Agent Lack was not the only government witness to testify that  
10 Seaton's allocation of costs was not reasonable and equitable. Based on the overwhelming evidence  
11 of guilt, it is not more probable than not that Agent Lack's opinion testimony that Seaton inequitably  
12 allocated costs materially affected the guilty verdicts on any of the counts. It follows, therefore, that  
13 even if Seaton's appellate attorney had challenged the admission of Agent Lack's opinion testimony,  
14 there is no likelihood that it would have resulted in a reversal of Seaton's convictions. Accordingly,  
15 Seaton cannot demonstrate that his appellate counsel's performance prejudiced him, and his section  
16 2255 claim based upon the ineffectiveness of his appellate counsel in challenging the admission of  
17 Agent Lack's testimony necessarily fails.

18 III. Ineffective Assistance of Trial and Appellate Counsel for Failure to Argue *Yates* Error

19 Next, Seaton argues that he received ineffective assistance of trial and appellate counsel  
20 because of their failure to argue that the jury instructions for the conspiracy charge, Count One, were  
21 impermissible under *Yates v. United States*, 354 U.S. 298 (1957) *overruled on other grounds by*  
22 *Burks v. United States*, 437 U.S. 1 (1978). In *Yates*, the United States Supreme Court established  
23 that a jury verdict must "be set aside in cases where the verdict is supportable on one ground, but not  
24 on another, and it is impossible to tell which ground the jury selected." *Id.* at 312. Seaton contends  
25 that Count One of the indictment alleged that the objects of Seaton's conspiracy were (1) reporting  
26 false and fictitious direct nursing service costs; and (2) misrepresenting the level of nursing care  
27 provided to Medicare patients. According to Seaton, this is problematic because the second object  
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1 does not violate 18 U.S.C. section 287 or 1001. The jury, Seaton continues, was not required to  
2 return a special verdict as to which of these two objects of the conspiracy the jury agreed that Seaton  
3 entered into an agreement to commit. Seaton insists that this constitutes *Yates* error because it is  
4 impossible to know whether the jury relied upon the first, legally proper or the second, legally  
5 flawed ground in returning a guilty verdict on Count One. Seaton argues that he received ineffective  
6 assistance of trial and appellate counsel because neither his trial nor appellate counsel raised this  
7 issue. Seaton urges that this prejudiced him because had his counsel argued *Yates* error at either the  
8 trial or appellate level, it would have resulted in an acquittal on Count I at trial or reversible plain  
9 error on appeal.

10 As a preliminary matter, the court notes that under the Sentencing Guidelines that governed  
11 Seaton's sentence, he would have received the identical sentence whether or not he was convicted of  
12 the conspiracy count he now challenges.<sup>5</sup> Ninth Circuit precedent makes clear, however, that even if  
13 Seaton's success on his section 2255 petition would not result in the modification of his sentence, he  
14 still suffers prejudice, if, but for his attorney's unprofessional conduct, he would have been acquitted  
15 of the conspiracy charge. In *United States v. Palomba*, 31 F.3d 1456, 1465-66 (9th Cir. 1994), a  
16 section 2255 petitioner asserted that he received ineffective assistance of counsel after he was  
17 convicted of multiple counts of mail and wire fraud and one count of making false statements to a  
18 federal agency. Pursuant to the Guidelines, the petitioner was sentenced consecutive terms of 60  
19 and 11 months for the mail fraud counts, with the remaining sentences served concurrently. In his  
20 habeas petition, the petitioner complained that his attorney failed to move to dismiss the wire fraud  
21 counts, which had been added to the case via a superseding indictment filed more than seventy days  
22 after the filing of the original indictment, in violation of the Speedy Trial Act. *Id.* at 1459-60. It was  
23 undisputed that whether or not the petitioner had been convicted of the wire fraud counts, he would  
24 have received the identical sentence. The court held that even if the invalidation of the wire fraud  
25 counts would not affect the petitioner's sentence in any way, the convictions' continued validity  
26 caused the petitioner prejudice because of the unforeseeable collateral consequences they might  
27 cause him in the future. *Id.* at 1465 (discussing collateral consequences such as increased future  
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1 sentences if the petitioner were ever to recidivate, “the additional stigma of improper conviction and  
 2 [the improper conviction’s] use to impeach the defendant’s credibility in future proceedings”).  
 3 Accordingly, this court must address the merits of Seaton’s *Yates* argument.

4 Seaton’s argument fails, however, because it is built upon a false premise: that submitting a  
 5 cost report to Mutual of Omaha that “misrepresented the level of nursing care provided to Medicare  
 6 patients” is not a crime.<sup>6</sup> As the court properly instructed the jury regarding Count Five, Seaton  
 7 could only be found guilty of violating 18 U.S.C. section 1001 if the government established beyond  
 8 a reasonable doubt:

9 First, that the defendant made a false statement in a matter within the jurisdiction of  
 10 the United States Department of Health and Human Services Health Care Financing  
 Administration;

11 Second, the defendant acted willfully, that is, deliberately and with knowledge that  
 12 the statement was untrue;

13 And third, the statement was material to the United States Department of Health and  
 Human Services Health Care Financing Administration activities or decisions.

14 Tr. Trans., vol. 15, at 2259. Submitting a Medicare cost report to Mutual of Omaha that  
 15 “misrepresented the level of nursing care provided to Medicare patients” at St. Luke’s satisfies every  
 16 element of the crime. By definition, a misrepresentation is a false statement. Seaton does not  
 17 contest that the level of nursing care provided to Medicare patients was both “within the  
 18 jurisdiction” and “material to the . . . activities or decisions” of the Health Care Financing  
 19 Administration. And Seaton has not challenged that the false statements transmitted to Mutual of  
 20 Omaha were knowingly and deliberately untrue. Seaton does not cite a single case (or even engage  
 21 in substantive analysis of the statute itself) that supports his reading of section 1001. An attorney  
 22 does not fall below his constitutional duty to his client by failing to raise a non-meritorious issue.  
 23 Because the issue that Seaton claims his attorneys should have raised was doomed to failure, he  
 24 cannot satisfy either *Strickland*’s performance or prejudice prongs. Accordingly, his claim based  
 25 upon *Yates* error is denied.

26 IV. Failure of Trial and Appellate Counsel to Advocate Correct Sentencing Standard  
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1 Finally, Seaton contends that both his trial and appellate counsel provided ineffective  
2 assistance of counsel by failing to oppose a two-point sentencing enhancement imposed upon Seaton  
3 pursuant to U.S.S.G. section 3B1.3 for abuse of a position of trust. Specifically, Seaton avers that  
4 his trial and appellate counsel failed to argue that out-of-circuit precedent, namely *United States v.*  
5 *Garrison*, 133 F.3d 831 (11th Cir. 1998), compelled a conclusion that Seaton's conduct—false cost  
6 reporting by a care provider to a fiscal intermediary regarding Medicare reimbursement—could not,  
7 as a matter of law, constitute an abuse of a position of trust. Seaton argues that his trial counsel's  
8 performance “fell below an objective standard of reasonableness” because he “should have . . .  
9 explained that *Garrison* was on all fours.” Seaton's Mot. at 41; *see also id.* at 40 (“Seaton's  
10 sentencing counsel rendered i[n]effective assistance of counsel] in not advocating at the final  
11 sentencing hearing that U.S.S.G. 3B1.3 . . . did not apply to Seaton under *Garrison*); *id.* 45 (“It was  
12 ineffective assistance of counsel not to present arguments [relying upon *Garrison*] when the law was  
13 settled at the time in its favor . . .”).

14 The court need not address the merits of Seaton's argument. “Omitting citation of [a]  
15 non-controlling, albeit analogous, case does not amount to constitutionally inadequate  
16 representation.” *Morales v. United States*, No. Civ. 03-980ADM, 2003 WL 22999561, at \*9 (D.  
17 Minn. Dec. 18, 2003) (citing to *United States v. Garcia*, 997 F.2d 1273, 1283 (9th Cir. 1993), for the  
18 proposition that “failure to cite [a] non-binding decision did not render legal assistance  
19 ineffective”).<sup>7</sup> Even assuming, as Seaton suggests, that *Garrison* was “on all fours” with his own  
20 case, Seaton could not suffer any prejudice by his trial or appellate counsel's failure to cite  
21 *Garrison*. Neither this court nor the Ninth Circuit would have been bound by *Garrison*, and both  
22 would have been free to reach a contrary result. Indeed, in all likelihood this court would have ruled  
23 to the contrary in view of the fact that, although this Circuit has not spoken on the issue, all of the  
24 other circuits that have done so have come to the opposite conclusion from *Garrison*. *See United*  
25 *States v. Hayes*, 574 F.3d 460, 479-80 (8<sup>th</sup> Cir. 2009) (“the majority of our sister circuits that have  
26 addressed the question have held that health care providers who defraud Medicaid or Medicare may  
27 be subject to the abuse-of-trust enhancement”, citing four other circuits so holding). Therefore, had  
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1 his attorneys relied upon *Garrison* in arguing that the abuse of discretion enhancement should not  
2 apply, “there is [not] a reasonable probability that . . . the result of the proceeding would have been  
3 different.” *Strickland*, 466 U.S. at 694.

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5 CONCLUSION

6 Seaton’s motion to vacate plea, judgment and sentence due to ineffective assistance of  
7 counsel is DENIED.

8 IT IS SO ORDERED.  
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12 Dated: May 14, 2010

  
\_\_\_\_\_  
MARILYN HALL PATEL  
United States District Court Judge  
Northern District of California

**ENDNOTES**

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2 1. For a more general description of the Medicare program, see *United States v. White*, 492 F.3d 380  
387-89 (6th Cir. 2007).

3 2. Under the rule, "Nursing service costs refer only to gross salaries and wages of nursing and related  
4 personnel, such as registered nurses, LPN's, aides, etc."

5 3. The following, relevant colloquy to place at trial.

6 The government: Now, [the defense] asked you about equitable allocation. Based on  
7 your investigation here, did the defendants equitably allocated their costs between the  
8 Medicare distinct party and the non-Medicare part?

9 The defense: Objection, inadmissible lay opinion, no foundation, no expertise.

10 The court: Objection overruled.

11 The defense: And speculation.

12 The court: Objection overruled.

13 Agent Lack: No, they did not. They inequitably, or, they did not equitably allocate their  
14 time.

15 The government: Why do you say that?

16 Agent Lack: What they did is they double-billed -- can I use the charts, of the floor plan?

17 [Explanation of "double-billing" engaged in by Seaton at St. Luke's]

18 The defense: I move to strike that characterization of double-billing. There's no charge  
19 of this. This is simply inadmissible lay opinion and mischaracterization of the evidence,  
20 your honor.

21 The court: Objection is overruled.

22 Tr. Trans., vol. 3 at 475-77.

23 4. Seaton cites a number of cases suggesting that in order for the harmless error rule to apply, the  
24 government must demonstrate, beyond a reasonable doubt, that the error was harmless. See Seaton's  
25 Reply at 8 (citing to *United States v. Vargas*, 933 F.2d 701, 704-05 (9th Cir. 1991), and *Chapman v.*  
26 *California*, 386 U.S. 18 (1967)). The cases cited by Seaton, however, address circumstances in which  
27 the erroneous admission of evidence violated a defendant's constitutional rights, such as when testimony  
28 is admitted in violation of the Confrontation Clause. Here, the error complained of by Seaton is that the  
court admitted evidence in violation of Federal Rules Evidence 701 and 702, which govern the  
admission of expert testimony. Neither Rule 701 nor 702, implicate any constitutional rights of  
defendants. Accordingly, the court will apply the standard for non-constitutional error, which mandates  
reversal only where "it is more probable than not that the error materially affected the verdict." See  
*Freeman*, 498 F.3d at 901.

5. A close examination of the Presentence Report submitted in his underlying case, which the court  
adopted in full, indicates that the conspiracy conviction played no role in determining his base offense  
level or any enhancements that increased his offense level. Under the 2000 revision to the United States

1 Sentencing Guidelines (“the Guidelines”), the version that governed Seaton’s case, the court placed  
2 Seaton in criminal history category I and calculated a total offense level of 28, resulting in a mandatory  
3 guidelines range of 78 to 97 months. The court sentenced Seaton to 78 months in prison, the low end  
4 of the range.

5 6. The court assumes, *arguendo*, that the allegation that Seaton challenges in paragraph ten of the  
6 indictment identified the object of the conspiracy charged in Count One. Such is likely not the case, as  
7 the allegations in paragraph ten are naturally interpreted as alleged overt acts, not the object of the  
8 conspiracy. Paragraph nine sets forth the formal charge against St. Luke’s and Seaton, stating that

9 [b]eginning in or about 1996, and continuing through in or about 2000, within the  
10 Northern District of California, and elsewhere, the defendants St. Luke’s Subacute  
11 Hospital and Nursing Centre, Inc. and Guy Roland Seaton, together with others known  
12 and unknown to the Grand Jury, did *knowingly and intentionally conspire to make false*  
13 *statements* to defraud the United States of its right to have the Medicare Program  
14 administered honestly and free from deceit and fraud and to have Medicare Program  
15 funds disbursed in accordance with the laws of the United States.

16 Indictment ¶ 9 (emphasis added). The natural reading of this paragraph is that the object of the  
17 conspiracy was to knowingly and intentionally make false statements to the United States, which is a  
18 crime under 18 U.S.C. section 287.

19 Furthermore, the allegations in paragraph ten appear in a section of the complaint entitled  
20 “Method and Means of the Conspiracy.” Although the court need not reach the issue, it appears that  
21 these allegations set forth overt acts in furtherance of the conspiracy, as opposed to the objects of the  
22 conspiracy.

23 7. It should be noted, as well, that Seaton’s trial counsel *did* cite to *Garrison* in his sentencing  
24 memorandum. *See* Docket No.191 (Seaton’s Sentencing Mem.) at 8. As a result, Seaton would, in all  
25 likelihood, be unable to establish that his trial counsel’s performance was deficient in order to satisfy  
26 the first prong of the *Strickland* analysis. *See Schmidt v. United States*, No. 06-04378, 2006 WL  
27 3734594, at \*2 (N.D. Cal. December 18, 2006) (Breyer, J.) (holding that a “[p]etitioner cannot suffer  
28 prejudice from his attorney’s failure to raise an argument when the argument was actually made.”).